IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

CRL.A.No. 1510 of 2004()

SC.360/1999 of ADDITIONAL SESSIONS COURT (ADHOC)-II, KOLLAM

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APPELLANT: ACCUSED NO.1

JAYADEVAN, S/O.NEELAKANTAN,
KOCHUTHUNDIL VEEDU, PULIKULAM
SOORANADU NORTH, KOLLAM.

BY ADV. SRI.DILEEP P.PILLAI

RESPONDENT: COMPLAINANT

STATE, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Crl.M.A.No.10831/2004 in Crl.A.1510/2004

Dismissed.

21-12-2006

Sd/-K.Thankappan,
Judge.

K.Thankappan, J.

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Crl. A. No. 1510 of 2004

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Dated this the day 21st December, 2006

JUDMENT

The appellant, accused in S.C.No.360/99 on the file of the Additional District and Sessions Judge (Adhoc) II, Kollam, faced trial for for the offence punishable under section 55(a) of the Abkari Act on the allegation that he and the 2nd accused kept 20 litres of arrack in their house without any licence or permit under the provisions of the Abkari Act. To prove the charge against the appellant and the 2nd accused, the prosecution examined PW1 to PW6 and produced Exts.P1 to P4. MO1 was also produced on the side of the prosecution. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the commission of offence alleged against him. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.1,00,000/- for offences under section 55(1) of the the Abkari Act and in default to undergo simple imprisonment for one year. The 2nd accused was acquitted under section

235(1) Cr.P.C. by the trial court. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

3. Learned counsel for the appellant contends that the trial court went wrong in placing reliance on the prosecution witnesses to find the appellant guilty of the charge and that there is no independent evidence to support the prosecution case and hence the finding entered by the trial court on the basis of the official witnesses is wrong. It is also contended that the police officials, who registered the crime, prepared the documents with regard to the seizure of the contraband article and taking of the sample, have not complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual.

4. To prove the case against the appellant, the prosecution mainly relied on the evidence of PW3 to PW5. PW5, who is the detecting officer, stated that on 21-11-1998 while he along with PW3 and PW4 were on patrol duty at about 5.45 P.M. reliable information was received that the appellant and the 2nd accused were keeping arrack at Kochuthundil house for sale and when they reached near the house, they saw the appellant and the 2nd accused running away from the house. He also stated that he

searched the house in the presence of witnesses and recovered MO1 can with 20 litres of arrack after preparing Ext.P1 seizure mahazar. This witness further stated that samples were taken in a bottle and sealed and labelled in the presence of the witnesses. He sated that the appellant was arrested on 24-11-1998 and the 2nd accused surrendered after the charge-sheet filed against the accused. He also stated that the sample was sent for chemical analysis and as per Ext.P4 report the sample contains 24.62% ethyl alcohol by volume. This witness further stated that PW6 continued the investigation and filed the final charge against the appellant and the 2nd accused. PW3 and PW4 constables who accompanied PW5 had given evidence before the court that when they reached the Kochuthundil house, they saw the appellant and 2nd accused were running out of the house. They also stated that PW5 prepared Ext.P1 seizure mhazar and P2 sketch and seized MO1 can from the house.

5. Question to be analyzed in the light of the contention of the learned counsel is that whether the evidence adduced by the prosecution is sufficient to find the appellant guilty of the offence charged against him. The trial court had given much reliance on the evidence of PW5 with regard to the search and seizure of the contraband article from the house. As per the prosecution evidence, it can be seen that when the police party reached

the house, they saw the appellant and the 2nd accused were running out of the house. It is relevant to note that though description of the house was given, it is not stated whether the house was numbered. It is also not stated that the house belongs to the appellant or the 2nd accused. The evidence of PW3 to PW5 would show that the people of the locality surrounded the house, but none of them was made as a witness in Ext.P1 and P2. PW1 and PW2 stated that they had signed only a white blank paper. The evidence of PW1 and PW2 would show that they are residing far away from the place of occurrence. The incident occurred on 21-11-1998. When PW5 was examined before the court, he admitted that MO1 and the samples were produced before the court only on 2-12-1998. No satisfactory explanation was given for the delay. To support the contentions, the learned counsel relies three decisions of this Court reported in Narayani V. Excise Inspector (2002(3) KLT 725, Alex V. State of Kerala (2003(1) KLT SN 9) and Dominic V. State of Kerala (1989(1) KLT 601. In Narayani V. Excise Inspector (2002(3) KLT 725 (Supra) this Court had taken a view that "**the prosecution has not proved that residue and sample were kept in the proper custody till those items were produced in court on 13-9-1995 and chance of tampering cannot be ruled out, benefit of doubt is to be given to the accused".** In Alex V. State of Kerala (2003(1) KLT SN 9) this

Court had taken the view that the seizure should be reported to court forthwith. In Dominic V. State of Kerala (1989(1) KLT 601 this Court had taken the view that "**when S.36 of the Abkari Act and paragraphs 17,26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis**'. It has come out in evidence that the contraband article was produced before the court only on 2-12-1998. No proper explanation was given by PW5 regarding the delay.

6. In the above circumstances, this Court is of the view that the contentions of the learned counsel are sustainable and the evidence adduced by the prosecution is not sufficient to prove the case against the appellant. Hence, this Court finds that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

6. Therefore, the impugned judgment is set aside and the appellant is acquitted. Bail bond executed by the appellant shall stand cancelled. The appeal is allowed, accordingly.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 1510/2004

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Judgment

21-12-2006